

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No.
	)	91 CV 00578-JLF
NL INDUSTRIES, INC., et al.	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
CITY OF GRANITE CITY, ILLINOIS,	)	
et al.	)	
	)	
Intervenor/Defendants.	)	

**GRANITE CITY'S FIRST AMENDED COUNTERCLAIM**

COMES NOW Intervenor/Defendant, the City of Granite City, Illinois ("City" or "Granite City"), and for its First Amended Counterclaim, states as follows:

**PARTIES**

1. Granite City is a home rule municipality in Madison County, Illinois, with approximately 33,000 residents. The City is directly impacted by U.S. EPA's selection of a remedial action for the NL Industries/Taracorp Superfund site ("NL Site" or "Site") in Granite City, Illinois, that requires excavation and transport of residential soil containing down to 500 parts per million (ppm) of lead. As a result of the remedial action, Granite City will be subject to extensive soil removal by earth-moving equipment in City common areas and residential yards; increased heavy-weight truck and equipment traffic on City streets; disruption to City community facilities and public areas, including utility and sewer systems; the permanent deposit



of contaminated soil in an already enormous pile overshadowing the City's central business district; and, a probable increase in lead dust throughout the City during excavation activities. Granite City may be required to mitigate damage to the City's infrastructure, property, and reputation. The City also owns various parcels of real property which will be excavated and filled in during the remedial action, including properties located at 840 and 1243 Niedringhaus Avenue, 1300, 1302, and 1411 19th Street; 1909, 1837, 2030, and 2000 Edison Avenue; 1837 Madison Avenue; 1801 and 1815-17 Grand Avenue; and 2301 Adams Street.

2. The United States, through Valdas V. Adamkus, the Regional Administrator of the Region V offices of the U.S. EPA, issued a Record of Decision selecting the remedial action for the NL Site.

#### JURISDICTION AND VENUE

3. This is an action for declaratory and injunctive relief to prevent Plaintiff from going forward with its proposed residential soil excavation at the NL Site until a residential soil remedial action plan has been selected that is appropriate and necessary, and is in accordance with applicable law.

4.  Court has jurisdiction over this claim pursuant to Sections 113(b) and 113(h) (1), (2), (4), and (5) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9613(b) and 9613(h)(1), (2), (4), and

(5); 28 U.S.C. 1331; 28 U.S.C. 2201 and 2202; and Rule 13(a) of the Federal Rules of Civil Procedure.

5. Venue properly lies in the Southern District of Illinois pursuant to Section 113(b) of CERCLA, 42 U.S.C. 9613(b), because the Site is located within the District.

#### **STATEMENT OF THE CLAIM**

6. The NL/Taracorp property, a former battery recycling and secondary lead smelting facility, is located in Granite City.

7. U.S. EPA has defined the NL Site to include, in addition to the NL/Taracorp property, more than 55 square blocks in Granite City containing more than 1,200 residences and numerous commercial properties where lead concentrations in soil are alleged to exceed 500 ppm, as well as certain areas within the nearby communities of Eagle Park Acres and Venice Township where battery case material was used as fill.

8. In June, 1986, U.S. EPA placed the NL Site on the National Priorities List.

9. On or about January 10, 1990, U.S. EPA proposed its plan for remedial action for the Site. That plan included the requirement that soils and battery case materials containing lead concentrations greater than 500 ppm be excavated from all residential areas at the Site, and that the excavated material be transported, to be consolidated with a huge waste pile already present on the NL/Taracorp property. It was estimated that between 112,000 and 160,000 cubic yards of residential soil would

have to be excavated and moved under the EPA remedial action plan.

10. During the public comment period, Granite City and many concerned citizens vigorously protested the proposed plan and requested U.S. EPA to justify its proposed remediation plan and to conduct additional scientific studies and investigations. The Mayor of Granite City met with representatives of U.S. EPA on several occasions during and after the public comment period to request reevaluation of and to object to its remedial plan.

11. U.S. EPA ignored Granite City's comments and objections and on March 30, 1990, adopted its Record of Decision, which includes a final remedial action plan containing the same residential soil excavation requirement as the proposed plan, despite the absence of any showing of community support.

12. On July 31, 1991, the United States filed its Complaint in this action against NL Industries and several alleged generators, seeking to recover its response costs pursuant to Section 107 of CERCLA, 42 U.S.C. 9607, seeking injunctive relief to compel the defendants to comply with an administrative order issued pursuant to Section 106 of CERCLA, 42 U.S.C. 9606, and seeking to recover penalties for violation of such order.

13. ~~On~~ February 21, 1992, this Court entered its First Case Management Order. That Order granted the City leave to intervene in this action as a defendant and granted the City the right to file a counterclaim at any time upon leave of Court. That Order also provided that this action would proceed in phases, with all

issues with respect to U.S. EPA's selected remedy to be determined first.

14. A health study of Granite City residents was commissioned by the State of Illinois and the federal government after U.S. EPA issued the Record of Decision, which study is known as the Madison County Exposure Study. (AR No. 217). The study was designed to provide information specifically about the effects of lead at Granite City. Participants in the study have stated that findings do not show any quantitative correlation between soil-lead and blood-lead levels. See also Statement of Dr. Renate D. Kimbrough before the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, U.S. House of Representatives, 6/9/92, attached hereto as Exhibit A. Despite these results, U.S. EPA employees stated both before and after the study was conducted that they did not intend to permit any blood-lead level findings to affect their selection of the residential soil clean-up standard. See newspaper articles attached hereto as Exhibit B. The report confirmed the preliminary findings that Granite City does not have a soil related blood lead problem and that blood lead levels in Granite City are similar to blood lead levels in other urban cities. In addition, ~~some~~ regard to the correlation between soil lead and blood lead, the report expressly stated that "[e]liminating a variable such as soil that accounted for only 3% of the variance may only result in a minimal change in measured blood lead levels

without any clinical significance." Madison County Exposure Study, p. 49.

15. In August 1994, the U.S. EPA proceeded to implement its illegal residential soil remediation strategy, which prompted Granite City to seek injunctive relief. As a result of that action, a settlement was reached between the parties which allowed the U.S. EPA to remediate a limited number of residential properties, where the soil lead levels were demonstrated to be in excess of 1,000 ppm. Also as a consequence of the settlement, the U.S. EPA reopened the comment period in October 1994, to accept comments on the original Record on Decision. The comment period closed in January 1995. The U.S. EPA also opened a comment period regarding other elements of the site clean-up. Eight months later, U.S. EPA issued a Decision Document/Explanation of Significant Differences ("DD/ESD") which reaffirmed the 500 ppm standard that has been in dispute.

16. As a direct outcome of the above described settlement, Granite City retained Dr. Robert Bornschein of the University of Cincinnati to examine the residential properties remediated to date by the U.S. EPA, to determine if the removal of soil from residential yards would substantially reduce the risk of further lead exposure to the residents of Granite City. The study results described in the report, "The Effectiveness of Soil Removal on Lead Exposure in Granite City", demonstrated that abatement of residential soil does not effectively reduce housedust lead levels and therefore is likely to have a minimal

effect on lead exposure. In fact, Dr. Bornschein's study revealed that interior housedust lead levels increased at many of the dwellings evaluated. The study results also revealed the soil itself became contaminated after the completion of abatement activities. As soon as the study was completed, Granite City provided same to counsel for the government and has asked it be included in the record. After the close of the public comment period, U.S. EPA is required to consider comments which contain significant information not contained elsewhere in the record and which could not have been submitted during the comment period. (40 C.F.R. 300.824(c)).

17. Pursuant to Section 121(a) of CERCLA, 42 U.S.C. 9621(a), U.S. EPA was required to select appropriate remedial actions determined to be necessary at the Site and which provide for cost-effective response.

18. Pursuant to Section 121(b)(1)(G) of CERCLA, 42 U.S.C. 9621(b)(1)(G), U.S. EPA was also required, in assessing alternative remedial actions for the NL Site, to take into account the potential threat to human health and the environment associated with excavation, transportation, and re-disposal or containment.

19. ~~Section~~ 113(k)(1) of CERCLA, 42 U.S.C. 9613(k)(1), required U.S. EPA to establish an Administrative Record upon which it based the selection of its response action at the NL Site.

20. The Administrative Record established by U.S. EPA for the NL Site does not provide a basis for the finding that requiring excavation of residential soil down to 500 ppm of lead is appropriate for the NL Site, for the following reasons:

(a) Site-specific information regarding the effect of the Site on Granite City residents, such as current blood-lead data, is not included in the Administrative Record, or is ignored. The Administrative Record does not contain any site-specific data which establishes that residents of Granite City presently have or will have increased blood-lead levels as a result of lead in residential soils. Rather, the U.S. EPA relies upon a model using default values that are not appropriate for Granite City.

(b) The Administrative Record does not address whether any quantitative correlation exists between soil-lead levels at the Site and blood-lead levels of the residents. Such a correlation is the recognized indicator that an environmental condition is causing an adverse health effect. Indeed, the data demonstrates removal of soil has no material bearing on reducing blood lead levels.

~~On~~ On October 6, 1995, U.S. EPA released the DD/ESD. The DD/ESD stated the basis for the decision with regard to the 500 ppm standard, was set forth in Attachment 4, a document titled "Statistical Analysis of Data from the Madison County Lead Study and Implications for Remediation



of Lead - Contaminated Soil," by Allan H. Marcus, PhD ("the Marcus Report"). Once more, the U.S. EPA used generalized default values rather than site - specific measurements, using a new version of the IEUBK model. At no time was Granite City permitted an opportunity to comment on the Marcus Report or the revised version of the IEUBK model.

21. The Administrative Record also does not provide a basis for finding that U.S. EPA took into account the potential threat to the health of Granite City residents and the environment associated with exposure to lead dust during residential soil excavation, transportation, and re-disposal, or with the permanent deposit of contaminated soil adjacent to the Granite City central business district.

22. In March 1996, Granite City was advised of the U.S. EPA's intention to begin soil remediation at approximately 100 residential properties. In May 1996, U.S. EPA contractors commenced with this phase of the clean-up at 1712, 1714, 1728, 1730 and 1734 Edison Avenue, and 1915 Cleveland Avenue, to name some of residential properties.

23. The interest of the City in prohibiting the implementation of the residential soil component of the remedial plan is ~~substantial~~ and immediate, and the property, health, and safety interests of the City and its residents will be irreparably harmed, for the following reasons:

(a) The residential soil removal will jeopardize the health of residents, workers, and visitors in Granite City

by generating lead-bearing dust which will be dispersed throughout the City. No showing has been made by U.S. EPA that any benefit that may be derived from excavation will outweigh the increased risk resulting from the disturbance and dispersal of contaminated soil presently covered by vegetation. Indeed, Dr. Bornschein's study suggests the excavation will be counter productive and the residential soils will be recontaminated.

(b) The residential soil removal will inhibit the commercial development and economic growth of the City, and create an undue social and economic stigma.

(c) The residential soil removal will take years to execute, during which period construction workers, heavy earth-moving equipment, and dump trucks will continuously occupy Granite City's community and its streets.

(d) The City's infrastructure may be damaged during the residential soil removal. Granite City may be required to incur additional costs for maintenance and repair of its infrastructure as a result of the remedial activities.

(e) By failing to follow the CERCLA statutory requirements, U.S. EPA's implementation of its proposed residential soil excavation to a level of 500 ppm will constitute a deprivation of the City's health and property interests without due process of law.

24. Granite City has no adequate remedy at law.

25. As additional legal argument, the U.S. EPA is without legal authority to implement residential soil excavation as it lacks legal authority. CERCLA is unconstitutional as it exceeds the authority of Congress under the Commerce Clause, U.S. Const., Art. I, Sect. 8, cl.3, to regulate local activities.

26. Plaintiff received notice of the City's intent to sue in compliance with 42 U.S.C. 9613(i) and 9659(e).

WHEREFORE, the City prays for judgment:

(a) Declaring that 1) the remedy selected by Plaintiff for the NL Site violates 42 U.S.C. 9621 and the regulations promulgated thereunder; 2) a proper application of the statutory standards requires a finding that selection of a remedy calling for removal of all residential soil containing more than 500 ppm of lead is not appropriate or necessary; 3) the government's finding to the contrary was arbitrary and capricious; and 4) CERCLA is an unconstitutional and illegal impediment to the Commerce Clause.

(b) Enjoining and restraining Plaintiff from proceeding with the residential soil remedial action plan for the NL Site as proposed in the Record of Decision until the Plaintiff fully complies with 42 U.S.C. 9621 and the other provisions of the National Contingency Plan, and the Plaintiff selects a residential soil remedial action plan for the NL Site that is appropriate and necessary.

(c) Awarding the City with reasonable attorneys' fees, costs, and disbursements of this action.

(d) Awarding such other relief as the Court may deem just and appropriate.

Respectfully submitted,

CITY OF GRANITE CITY, ILLINOIS,  
Intervenor/Defendant

By: Edward C. Fitzhenry, Jr.  
Edward C. Fitzhenry, Jr.  
City Attorney  
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1939 Delmar  
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ARDC No. 06180218

STATE OF ILLINOIS )  
 ) SS.  
COUNTY OF MADISON )

**VERIFICATION**

Edward Fitzhenry, being duly sworn upon his oath,  
states that he is the Attorney of Granite City,  
Illinois, one of the Intervenor/Defendants in the above-entitled  
action, that as such he is authorized to make this affidavit,  
that he has read the foregoing First Amended Counterclaim, and  
that the same is true and correct to the best of his knowledge,  
information, and belief.

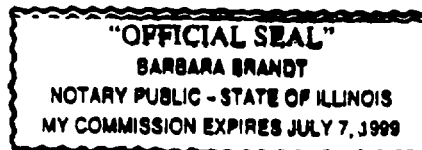
Edward C Fitzhenry

Subscribed and sworn to before me this 10<sup>th</sup> day of  
June, 1996.

Barbara Brandt

My Commission Expires:

7-7-99



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